

<b>PRE-APPEAL BRIEF REQUEST FOR REVIEW</b>		Docket Number (Optional) <div style="text-align: center;">2060/43</div>	
<div style="text-align: center; margin-bottom: 10px;"> Certificate of Electronic Transmission  Under 37 C.F.R. §1.8 </div> <p>I hereby certify that this correspondence and any document referenced herein are being electronically filed with the USPTO via EFS-Web on November 9, 2009.</p> <p style="text-align: center;"> <u>Michelle J. Wolf</u>  (Printed Name of Person Sending Correspondence) </p> <p style="text-align: center;"> <u>/Michelle J. Wolf/</u>  (Signature) </p>		Application Number <div style="text-align: center;">10/522,201</div>	Filed <div style="text-align: center;">February 16, 2006</div>
		First Named Inventor <div style="text-align: center;">Jean Dolbec</div>	
		Art Unit <div style="text-align: center;">2456</div>	Examiner <div style="text-align: center;">Tom Y Chang</div>
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s).  Note: No more than five (5) pages may be provided.</p> <p>I am the</p> <div style="display: flex; justify-content: space-between; align-items: flex-start;"> <div style="width: 60%;"> <p><input type="checkbox"/> applicant /inventor.</p> <p><input type="checkbox"/> assignee of record of the entire interest.  See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)</p> <p><input checked="" type="checkbox"/> attorney or agent of record.  Registration number <u>35,277</u></p> <p><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34.  Registration number if acting under 37 CFR 1.34. _____</p> </div> <div style="width: 35%; text-align: center;"> <p>_____ /Stuart H. Mayer/ Signature</p> <p>_____ Stuart H. Mayer Typed or printed name</p> <p>_____ 908.518.7700 Telephone number</p> <p>_____ November 9, 2009 Date</p> </div> </div> <p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p>			
<input checked="" type="checkbox"/> *Total of <u>1</u> forms are submitted.			

**Status of Claims**

Claims 1-11 and 20 are pending in this application. Claim 1-11 and 20 have been finally rejected.

**The Rejection in view of Doshi in view of Henderson is Clearly Erroneous**

Claims 1-11 and 20 are rejected under 103(a) as being anticipated by Doshi et al. (US 6,130,875, “Doshi”) in view of Henderson et al. (US 6,058,103, “Henderson”). It is respectfully submitted that this rejection is clearly erroneous.

The Examiner asserts in the Final Action that Henderson shows the claimed step of determining the impact of the cabling changes on service through the network, including impacts on cross-connects and lightpaths. As support for this assertion the Examiner points to column 7, lines 53-56 of Henderson, which states:

The nsGeoLink class 212 and the nsGeoNode class 214 handle graphical rendering of communications links and communications equipments for presentation on, for example, a geographical map.

Thus, Henderson simply discusses communications links. The Examiner further asserts on page 7 of the Final Action, however, that “Henderson teaches determining the connectivity of paths between endpoints in a network. Since the network uses optical media the paths are correctly construed as lightpaths.” Applicants respectfully disagree.

In particular, not all paths through optical media are a lightpath. Rather, it is well known that a lightpath refers to a point to point connection with an effective guaranteed bandwidth (see, for example, Bill St. Arnaud, “User controlled Lightpaths Definition Document”, copy enclosed and available at [http://www.canarie.ca/canet4/library/c4design/user\\_controlled\\_definition.ppt](http://www.canarie.ca/canet4/library/c4design/user_controlled_definition.ppt)). A lightpath can be realized by allocating a wavelength on each link on the path between two end nodes. The wavelengths used on the various links may be the same or different. However, the same wavelength cannot be assigned to two different lightpaths on the same link. (see, e.g., R. Ramaswami et al. Optical Networks: A Practical Perspective, Academic Press, London, 1998, page 333), copy enclosed.

In contrast to a lightpath, a communication link is generally understood to be a connection between adjacent nodes. Thus, when an end-to-end connection or path traverses multiple nodes, the path between them will comprise multiple communication links. A communication link is thus in general only part of an end-to-end path. Moreover, as noted above, not all paths constitute a lightpath. Rather, a lightpath may be construed as a very particular type of path. Accordingly, simply because Henderson refers broadly to the rendition of communication links over an optical medium does not mean that Henderson discloses the more particular step of rendering lightpaths, let alone the determination of the impact caused by cable changes on lightpaths. In fact, Henderson does not even specifically discuss lightpaths.

In the Advisory Action the Examiner asserts that the Applicant is suggesting that a strict interpretation of a lightpath must be used. The Examiner, on the other hand, asserts that since the specification does not define the term “lightpath,” he is applying the broadest reasonable interpretation. However, the Examiner appears to be ignoring the requirement of MPEP 2111, which states that “The Patent and Trademark Office (“PTO”) determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction “in light of the specification as it would be interpreted by one of ordinary skill in the art [emphasis added].” *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364[, 70 USPQ2d 1827] (Fed. Cir. 2004). To emphasize this point, this same section of the MPEP also states that “The broadest reasonable interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1359, 49 USPQ2d 1464, 1468 (Fed. Cir. 1999).”

In the present case the Examiner asserts that the person of ordinary skill is clearly sophisticated enough to apply Doshi with Henderson to allegedly arrive at the features of the claimed invention. However, Applicant respectfully submits that the Examiner is not applying a uniform standard since a person who is sophisticated enough to understand and combine the cited references would certainly appreciate that the term “lightpath” has a well-defined meaning in the industry. Furthermore, as noted above, the interpretation of the term “lightpath” used by the Examiner is inconsistent with the interpretation used by one of ordinary skill.

The Examiner states in the Advisory Action that “The fact that the applicant provided a submission of non-patent literature... as a means to support the applicant’s arguments further supports that the definition is not anywhere in the disclosure of the invention.” Applicant agrees with this statement; the specification does not define the term “lightpath.” However, there is no requirement that the specification define terms that are well known to the person of ordinary skill in the art (POSA). Indeed, why would applicant need to include a definition of a term that well known to the POSA? Without an express definition of the term in the specification, the Examiner is compelled to follow the mandate of MPEP 2111 and give the term “lightpath” the broadest reasonable interpretation that is consistent with the interpretation that those skilled in the art would reach.

In addition to non-patent references, as a perusal of the patent literature shows, the term “lightpath” is used in many patents and patent applications and, from a small sampling examined by the Applicant, very few of them seem to expressly define the term. Moreover, the one reference (from among those few examined by Applicant) in which a definition was presented, provided a definition consistent with that presented above (U.S. Publication No. 20090196603, paragraph 2), which is clearly different from the interpretation offered by the Examiner.

In summary, the Examiner’s construction of the term lightpath to mean any communication path traveled by light, while perhaps intuitively appealing from a lay person’s perspective, simply does not comport to the definition of the term as it is used by a person of ordinary skill in the art.

Reconsideration and withdrawal of the Examiner’s rejection of claims 1-11 and 20 are respectfully requested.